



LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 370

[Docket No. 20-CRB-0007-RM]

Regulation Concerning Proxy Distributions for Unmatched Royalties Deposited During 2010-2018

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges (Judges) are amending the applicable regulations to authorize the use of proxy reports of use to facilitate distribution of royalties collected for periods prior to January 1, 2019, for the licenses to make ephemeral reproduction and perform publicly sound recordings by means of digital audio transmissions. Proxy reports of use will be used for those services for which no reports of use were submitted or for which the reports of use were unusable.

DATES: Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Anita Brown, CRB Program Specialist, (202) 707-7658, crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

Sections 112 and 114 of the Copyright Act, title 17 of the United States Code, are the statutory licenses governing the public performance of sound recordings by certain types of eligible services¹ by means of a digital audio transmission. 17 U.S.C. 112(e), 114. Services operating under these licenses are required to, among other things, pay

¹ The types of eligible services consist of subscription, nonsubscription, satellite digital audio radio services, and business establishment services.

royalty fees and report to copyright owners of sound recordings on the use of their works. *Id.* The Copyright Act directs the Judges to determine the royalty rates to be paid, 17 U.S.C. 114(f)(1)(A), (f)(2)(A) and 17 U.S.C. 112(e)(3), and to establish regulations to give copyright owners reasonable notice of the use of their works and create and maintain records of use for delivery to copyright owners. 17 U.S.C. 114(f)(4)(A) and 17 U.S.C. 112(e)(4).

The purpose of the notice and recordkeeping requirement is to ensure that the royalties collected under the statutory licenses are distributed by a central source—a Collective—or other agents designated to receive royalties from the Collective to the correct recipients. The Judges promulgated final notice and recordkeeping regulations on October 13, 2009.² *See* 74 FR 52418.

On November 20, 2018, SoundExchange, Inc., the entity designated by the Judges as the Collective, requested that the Judges amend the applicable regulations to authorize SoundExchange “to use proxy reporting data to distribute to copyright owners and performers certain sound recording royalties for periods before 2019 that are otherwise undistributable due to licensees’ failure to provide reports of use” or their provision of “reports of use that are so deficient as to be unusable.” Letter from Steven R. Englund, counsel for SoundExchange, Inc., Docket No. 20-CRB-0007-RM at 1 & n.1.

In a second letter dated April 23, 2020 (April Letter), SoundExchange renewed its request. In the April Letter, SoundExchange stated it was holding approximately \$32 million in statutory royalties for the period 2010 through 2018 and requested that the Judges authorize SoundExchange to distribute these royalties using the same “annual/license type methodology” that the Judges approved in 2011. April Letter at 2, citing 37 CFR 370.3(i), 370.4(f). SoundExchange requested that the Judges change the dates in the cited regulations from “2010” to “2019.”

² Until that time, interim regulations were in effect. *See* 71 FR 59010 (Oct. 6, 2006).

In May 2020, the Judges published a notice of proposed rulemaking (NPRM) seeking comment on SoundExchange's proposal. 85 FR 32323 (May 29, 2020). In the notice, the Judges also announced that, if they adopted the proposed regulations, they intended to change the mandatory "shall" to a permissive "may" to authorize the subject distributions. Comments responsive to the NPRM were due June 29, 2020.

The Judges received three comments in response to the NPRM. One commenter, David Powell, filed a comment that in no way revealed an interest in the rulemaking proceeding. The comment of Sun-Glo Records, Inc. asserted an interest in recording royalties, but did not oppose the proposed rule change.

The third comment was submitted by SoundExchange, and addresses specific topics concerning which the Judges had previously inquired in connection with this NPRM. Specifically, SoundExchange states in this comment that:

- (1) It agrees with the Judges that it is preferable to use permissive language (the word "may") that would merely *allow* SoundExchange to use proxy data to distribute the relevant royalties, rather than mandatory regulatory language (the word "shall");
- (2) It has exhausted all reasonable alternative means to obtain missing reports; and
- (3) Use of the proposed annual/license type method, as set forth in the proposed regulations, is a reasonable option.

Given that the proxy will be applied to a small percentage of royalties for the relevant time period and that no viable alternatives have been provided, the Judges are adopting as final the proposed regulations as set forth in the NPRM allowing for the use of the proxy proposed by SoundExchange for the distribution of royalties for all periods before January 1, 2019. Adoption of the proposed regulations, especially in the absence

of opposition to the proposed proxy, will promote the expeditious distribution of the affected royalties.

List of Subjects in 37 CFR Part 370

Copyright, Sound recordings.

Final Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR part 370 as follows:

PART 370 – NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

1. The authority citation for part 370 continues to read as follows:

Authority: 17 U.S.C. 112(e)(4), 114(f)(4)(A), 803(b)(6)(A).

2. Section 370.3 is amended by revising paragraph (i) to read as follows:

§ 370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.

* * * * *

(i) In any case in which a preexisting subscription service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2019, reports of use for the corresponding calendar year filed by other preexisting subscription services may serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

3. Section 370.4 is amended by revising paragraph (f) to read as follows:

§ 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

* * * * *

(f) In any case in which a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service, or business establishment service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2019, reports of use for the corresponding calendar year filed by other services of the same type may serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective.

Dated: June 13, 2022.

Suzanne M. Barnett,
Chief U.S. Copyright Royalty Judge.

Approved by:

Carla D. Hayden,
Librarian of Congress.

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